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No. 94-820

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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QUESTION PRESENTED

Whether the "change in conditions" that permits modification of a disability award under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, includes a change in an injured employee's wage-earning capacity that results from factors other than a change in the employee's physical condition.

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BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-5a) is reported at 28 F.3d 86. The decisions and orders of the Benefits Review Board (Pet. App. 6a-10a) and administrative law judges (Pet. App. 11a-17a; 94-1045 Pet. App. 16a-20a [1]) are unreported.

[1] The Solicitor General filed a petition for a writ of certiorari on behalf of the Director, Office of Workers' Compensation Programs, seeking review of the same court of appeals' decision at issue here. *Director, Office of Workers' Compensation Programs* v. *John Rambo and Metropolitan Stevedore Co.*, No. 94-1045 (filed Dec. 12, 1994). The Court has not acted on that petition.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1994. The petition for rehearing filed by Metropolitan Stevedore Company was denied on August 10, 1994. Pet. App. 1a. The petition for rehearing filed by the Director, Office of Workers' Compensation Programs, was denied on September 14, 1994. 94-1045 Pet. App. 21a-22a. Metropolitan's petition for a writ of certiorari was filed on November 7, 1994, and was granted on January 13, 1995. 115 S. Ct. 787. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(10) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(10), provides in relevant part that " '[d]isability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Section 22 of the LHWCA, 33 U.S.C. 922, provides in relevant part:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, * * * review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue

a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation.

STATEMENT

1. In 1980, respondent John Rambo injured his back and leg while working as a longshore "frontman" for petitioner Metropolitan Stevedore Company. See Pet. App. 3a, 7a, 12a. He filed a disability claim with the Department of Labor under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*[2] The LHWCA defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10).

In 1983, an administrative law judge (ALJ) accepted a stipulation between Rambo and Metropolitan that Rambo had sustained a 22½% permanent partial disability that had produced a weekly wage loss of $120.24 per week, or 22½% of his average weekly wages of $534.88. 94-1045 Pet. App. 17a-18a. Under

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[2] Administration of the LHWCA is entrusted to the Secretary of Labor, see 33 U.S.C. 939(a), and that task has been assigned by regulation to the Office of Workers' Compensation Programs (OWCP), see 20 C.F.R. 701.202(a). The OWCP investigates claims, and in uncontested cases a district director (formerly a deputy commissioner, see 20 C.F.R. 702.105) in OWCP may issue awards. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). In contested cases, parties may obtain hearings before an administrative law judge (ALJ), who then issues a decision awarding or denying benefits. 33 U.S.C. 919(d); 20 C.F.R. 702.316, 702.331 *et seq.* An ALJ decision is reviewable by the Department's Benefits Review Board, and Board decisions are reviewable in the courts of appeals. 33 U.S.C. 921(a)-(c). Modification of compensation awards is governed by 33 U.S.C. 922 and 20 C.F.R. 702.373.

Section 8(c)(21) of the LHWCA, Rambo therefore received an award of $80.16 per week, which represented 66⅔% of "the difference between the average weekly wages of [Rambo] and [Rambo's] wage-earning capacity thereafter in the same employment or otherwise." 33 U.S.C. 908(c)(21). See 94-1045 Pet. App. 17a-18a. Pursuant to Section 8(f) of the LHWCA, 33 U.S.C. 908(f), the ALJ also limited Metropolitan's liability for permanent disability compensation to 104 weeks, after which a Special Fund, which the Director of the Office of Workers' Compensation Programs (OWCP) administers, became liable for the $80.16 weekly payments. 94-1045 Pet. App. 19a-20a; see 33 U.S.C. 944(i)(2).[3]

2. After receiving the disability award, Rambo attended crane school and obtained longshore work as a crane operator. Pet. App. 3a, 14a. He worked in that position for four to five years and performed additional work as a heavy lift truck operator when time was available. *Id.* at 14a. Between 1985 and

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[3] Although the Special Fund assumed liability for Rambo's compensation after the first 104 weeks under the award, Metropolitan retains a financial interest in the outcome of this case. Under the LHWCA, an employer's required contribution to the Special Fund depends in part on the amount of payments made by the Fund "during the preceding calendar year which are attributable to the" employer. 33 U.S.C. 944(c)(2)(B). In recognition of their continuing financial interest, employers "are given the authority to monitor their claims in the special fund," 20 C.F.R. 702.148(b), and are among the "part[ies] in interest" who are permitted to seek modification of an award. 33 U.S.C. 922; see 20 C.F.R. 702.148(b) (employer "can initiate [a] proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits").

1990, his average weekly earnings ranged from $1,307.81 to $1,690.50, or more than three times his pre-injury earnings. *Id.* at 15a-16a; see also *id.* at 3a. His physical condition, however, remained essentially unchanged. See *id.* at 3a, 15a. In 1989, Metropolitan sought modification of the award pursuant to Section 22 of the LHWCA, 33 U.S.C. 922, arguing that Rambo's increased earnings represented a "change in conditions" such that he is no longer "disab[led]" under the Act. Pet. App. 8a, 14a.

In 1991, a second ALJ agreed with Metropolitan and terminated Rambo's disability payments. Pet. App. 11a-17a. Relying on *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 282 (1984), aff'd, 776 F.2d 1225 (4th Cir. 1985), the ALJ reasoned that modification may be based on a change in a claimant's economic condition following an award. Pet. App. 13a-14a. The ALJ recognized that higher post-injury earnings are not necessarily determinative of an employee's wage-earning capacity and that it therefore was necessary "to consider wage-earning capacity in an open labor market under normal employment conditions." *Id.* at 14a. After undertaking that inquiry, the ALJ found that Rambo in fact no longer had a loss of wage-earning capacity. *Id.* at 14a-16a. In particular, the ALJ noted that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that Rambo was at no greater risk of losing his present job or seeking employment than anyone else; and that his present employment was not the result of a "beneficent" employer. *Ibid.*[4]

[4] The ALJ also rejected Rambo's arguments that only the ALJ who issued the 1983 award could modify it and that the

The Benefits Review Board affirmed. Pet. App. 6a-10a. Relying on *Fleetwood*, the Board rejected Rambo's argument that modification could not be granted absent a showing of a change in the claimant's physical condition. Pet. App. 9a. The Board also noted that Rambo "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [Rambo's] increase in wage-earning capacity after the original award of benefits." *Id.* at 10a.

3. The court of appeals reversed. Pet. App. 2a-5a. The court construed its own precedents, "supported by the clear weight of authority" (*id.* at 5a), to "make clear that only a change in a claimant's *physical* condition can justify an award modification." *Id.* at 3a; see *id.* at 4a (citing *Pillsbury* v. *Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), rev'd on other grounds, 301 U.S. 174 (1937); and *McCormick S.S. Co.* v. *United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933)). Thus, in the court's view, "[a] change in a claimant's wages, training, skills, or educational background is insufficient." Pet. App. 3a-4a.[5]

1983 award, which was based on stipulated facts, could not be modified because it was a "settlement." Pet. App. 12a-13a; see 33 U.S.C. 922 (settlements not subject to modification); 20 C.F.R. 702.373(a) (same). The Benefits Review Board agreed that the 1983 award was not a settlement, Pet. App. 9a, and did not discuss Rambo's arguments concerning the particular ALJ's authority to modify the award. The court of appeals did not reach either of those questions, and they are not at issue here.

[5] The court of appeals did not address Rambo's contention (see Br. in Opp. i) that Metropolitan's application for modifi-

SUMMARY OF ARGUMENT

A. Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA) allows modification of a disability award on account of a "change in conditions." 33 U.S.C. 922. Section 22's plain language demonstrates that the grounds for modification are not limited to a change in only one condition, such as a claimant's state of health, but also include other conditions relevant to a claimant's continuing entitlement to compensation. That construction is consistent with this Court's decisions, which have interpreted Section 22 broadly and have refused to read unstated limitations into the words that Congress chose.

The structure and purposes of the LHWCA also demonstrate that Section 22 allows modification based on changes in non-physical conditions bearing on entitlement to the award. The LHWCA provides death benefit awards to a deceased employee's survivors, based on various considerations. Those awards, however, are routinely subject to modification based on changes in the relevant conditions of entitlement,

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cation should be denied because its attorney represented to Rambo, who was represented by his own counsel, that the award would be paid for life. Whether such representations amounted to an express waiver of Metropolitan's right to seek modification, and whether modification of the award (now paid by the Special Fund, which was not a party to any such representations) should be denied on the ground that it would not "render justice under the [A]ct," see *McCord* v. *Cephas*, 532 F.2d 1377, 1380-1381 (D.C. Cir. 1976), are fact-bound questions that this Court should not address in the first instance. If this Court reverses the judgment in this case, the court of appeals may consider those issues on remand.

such as the remarriage of a surviving spouse, an end to dependency, or the receipt of concurrent benefits under another statute. The same approach should be followed in the case of a disability award that is based on a reduction in the employee's wage-earning capacity. That approach, which allows modification of awards to reflect changes in the employee's wage-earning capabilities, ensures that disability compensation will be fairly distributed based on a current measure of actual entitlement.

The construction that we urge is also consistent with the LHWCA's reporting provisions, which allow employers to require disabled employees to report their earnings. The only apparent purpose of that reporting requirement is to apprise employers of a possible basis for seeking modification of an award based on a change in the claimant's wage-earning capacity. More generally, the construction that we urge advances the LHWCA's goal of rehabilitating disabled workers by creating a positive financial incentive for employers to participate in rehabilitation programs. A contrary construction would not only impede the smooth operation of the statutory scheme, but could also be costly to the Special Fund, which the Director administers.

B. Contrary to the court of appeals' view, the phrase "change in conditions" has not been uniformly construed to mean only a change in a worker's physical condition. Even if it had been so construed, however, the Director's interpretation should prevail. Her interpretation not only finds compelling support in the statutory language, structure and purposes, but it is also a reasonable accommodation of the LHWCA's policies that is entitled to judicial deference. The

Director's construction is consistent with other interpretive aids as well, such as the LHWCA's legislative history, and it promotes sound administration of the Act. Under the Director's interpretation, changes in general economic conditions are not by themselves changes in conditions for LHWCA eligibility, and a mere change in a claimant's wages does not automatically establish a change in a claimant's wage-earning capacity.

ARGUMENT

THE "CHANGE IN CONDITIONS" THAT WILL PERMIT MODIFICATION OF AN AWARD UNDER SECTION 22 OF THE LHWCA INCLUDES A CHANGE IN AN INJURED EMPLOYEE'S WAGE-EARNING CAPACITY THAT RESULTS FROM FACTORS OTHER THAN A CHANGE IN THE EMPLOYEE'S PHYSICAL CONDITION

A. The Language And Purposes Of The LHWCA Require That The "Conditions" Permitting Modification Include Non-Physical Conditions That Are Relevant To A Claimant's Continuing Entitlement To Compensation

1. Section 22 of the LHWCA expressly allows modification of compensation because of a "change in conditions." 33 U.S.C. 922. Under the "normal" or "natural reading" of the Act, *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2595 (1992), the phrase "change in conditions" includes all conditions relevant to a claimant's continuing entitlement to compensation. Congress presumably used the unadorned plural term "conditions" intentionally. The plural usage indicates that modification is not limited to a change in only one condition, such as a claimant's physical state of health, but also includes

the full range of relevant circumstances. See, *e.g.*, *The American Heritage Dictionary of the English Language* 393 (3d ed. 1992) ("condition" may mean, *inter alia*, a "state of health," while "conditions" means "[e]xisting circumstances").

2. This Court's decisions construing Section 22's language show that "change in conditions" should not be confined to a change in physical condition. This Court has construed Section 22 broadly and has accordingly refused to give the statutory language a "narrowly technical and impractical construction" or to read unstated limitations into it. *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (per curiam). For example, the Court has refused to construe that Section to create a limitations period for acting on a timely filed claim. *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1 (1975). The Court has likewise refused to limit the "mistake in a determination of fact" ground for modification to mistakes that are demonstrated by new evidence rather than by the agency adjudicator's "further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 256. It has also refused to limit that ground for modification to "clerical errors and matters concerning an employee's disability, not to matters concerning an employer's liability." *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 462 (1968).

The Court should similarly refuse to read unstated limitations into the "change in conditions" ground for modification. Indeed, it would be anomalous to construe Section 22 simultaneously to allow the reopening of a final award for any reason to correct perceived factual mistakes in matters that have already been litigated, but to deny corrective authority

when the litigated facts have changed and the conditions that once justified payment of ongoing monetary benefits can no longer sustain that award. Cf. Fed. R. Civ. P. 60(b) (allowing a court to provide relief from a judgment on a variety of grounds, including mistake and changed circumstances).

3. More generally, the structure and purposes of the LHWCA's benefits scheme demonstrate that the changed conditions that may provide a basis for modification are not limited to changes in a claimant's physical condition. For example, it is well settled that, in death benefit cases, eligibility depends on whether a deceased employee's survivor qualifies as a dependent spouse, child, or other dependent relative. See 33 U.S.C. 909(b)-(d). Eligibility ends when a spouse dies or remarries, a child's age or status as a student or disabled dependent changes, or another relative is no longer dependent. 33 U.S.C. 902(14), 909(b) and (d). Section 22 unquestionably requires modification of a survivor's benefits award whenever there is a change in the survivor's eligibility status—a change that (with the exception of disabled dependent status) has no connection to the surviving claimant's physical condition. See 43 Fed. Reg. 36,786 (1978) (comments to regulations under Black Lung Benefits Act).[6]

Similarly, payment of disability and death benefits depends in part on whether a claimant is receiving

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[6] The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, incorporates a number of LHWCA provisions, including Section 22's provision for modification based on a change in conditions or a mistake in a determination of fact. See 30 U.S.C. 932(a) (incorporation provision); 20 C.F.R. 725.310(a) (modification provision).

concurrent benefits under another applicable law "for the same injury, disability, or death." 33 U.S.C. 903(e); see also 30 U.S.C. 932(g) (Black Lung Benefits Act). Accordingly, if a state decision establishing or modifying a claimant's entitlement to benefits under state law is rendered following an award of LHWCA benefits, it may be considered a change in conditions that supports modification of the LHWCA compensation order. *McDougall* v. *E.P. Paup Co.*, 21 Ben. Rev. Bd. Serv. (MB) 204, 208 (1988), aff'd on other grounds, 999 F.2d 1341 (9th Cir. 1993); see also *Dingess* v. *Director, OWCP*, 12 Black Lung Rep. (MB) 1-141 (1989); 43 Fed. Reg. 36,786 (1978) (Black Lung Benefits Act).[7]

The same principles should apply in "non-schedule" disability cases, such as this one, in which a loss of wage-earning capacity is an essential condition for entitlement to compensation and the employee's wage-earning capacity is determined on the basis of factors in addition to the employee's physical condition.[8]

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[7] As a general matter, state workers' compensation statutes, like the LHWCA, base entitlement on wage-earning capacity, not just physical condition. See 1C A. Larson, *The Law of Workmen's Compensation* § 57.11 (1994). Although state laws vary, at least some of them allow modification based on non-physical factors, including a change in earning capacity. See 3 A. Larson, *supra*, § 81.31(e); Ariz. Rev. Stat. Ann. § 23-1044.F (Supp. 1994) (modification based on non-physical factors, including a change in earning capacity); Ga. Code Ann. § 34-9-104(a) (Michie 1992) (same); Ky. Rev. Stat. Ann. § 342.125 (Michie/Bobbs-Merrill Supp. 1994) (same); Va. Code Ann. §§ 65.2-101, 65.2-708 (Michie 1991 & Supp. 1994) (same).

[8] A "schedule" case is one in which compensation is determined by reference to a schedule or list describing parts or

Because the LHWCA defines "[d]isability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. 902(10), courts have long recognized that "[t]he degree of disability in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, his mentality, his education, and the availability of that type of work which he can do." *Eastern S.S. Lines, Inc.* v. *Monahan*, 110 F.2d 840, 842 (1st Cir. 1940); accord, *e.g.*, *Louisiana Ins. Guar. Ass'n* v. *Abbott*, 40 F.3d 122, 126 (5th Cir. 1994) (White, J.); *See* v. *Washington Metro. Area Transit Auth.*, 36 F.3d 375, 381 (4th Cir. 1994); *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d 1031, 1037-1038 (5th Cir. 1981); *American Mut. Ins. Co.* v. *Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970); *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403, 405 (2d Cir. 1961).

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functions of the body and prescribing a fixed number of weeks of compensation for their loss (or loss of use). See 33 U.S.C. 908(c)(1)-(20), (22); *Bath Iron Works Corp.* v. *Director, OWCP*, 113 S. Ct. 692, 695 (1993); 1C A. Larson, *supra*, § 57.14(c). An employee with a scheduled injury is conclusively presumed to be disabled, even if the injury does not actually affect his wage-earning capacity. *Bath Iron Works*, 113 S. Ct. at 695 n.4. In a "non-schedule" case, which involves an injury that is not specified in the "schedule" or in a provision governing certain retiree claims, an employee receives compensation for two-thirds of the difference between his pre-injury average weekly wages and his post-injury wage-earning capacity. See 33 U.S.C. 908(c)(21) ("non-schedule" provision); 33 U.S.C. 908(c)(23) (retiree provision); *Bath Iron Works*, 113 S. Ct. at 695-696.

Thus, an LHWCA claimant who retains some physical ability to work may nevertheless be found to be totally disabled if there is no work available that the claimant can perform, *e.g.*, *Louisiana Ins.*, 40 F.3d at 126-127; *Eastern*, 110 F.2d at 841-842, while one who has a physical impairment from an injury may not be disabled at all if available employment results in no loss of wage-earning capacity. *Owens* v. *Traynor*, 274 F. Supp. 770, 773-776 (D. Md. 1967), aff'd, 396 F.2d 783 (4th Cir.), cert. denied, 393 U.S. 962 (1968); see also *Gardner* v. *Director, OWCP*, 640 F.2d 1385, 1390 (1st Cir. 1981); *Welch* v. *Leavey*, 397 F.2d 189, 191 (5th Cir. 1968), cert. denied, 393 U.S. 1049 (1969). Compare *Bowen* v. *Yuckert*, 482 U.S. 137, 140-142, 146-147 (1987) (discussing parallel concepts under Social Security disability programs); *Heckler* v. *Campbell*, 461 U.S. 458, 459-462 (1983) (same); see 42 U.S.C. 423(d)(1)(A) and (d)(2)(A) (1988 & Supp. V 1993) (definition of "disability" under Social Security Act providing for consideration of claimant's "age, education, and work experience" and the existence of suitable work in the national economy).

The principles expressed in prior LHWCA cases, which manifestly apply in initial non-schedule benefit determinations, should also apply upon a request to modify the initial award. For example, if a disabled employee's initial award is based on a finding that he has retained some wage-earning capabilities, but his retained skills become obsolete on account of particular technological advances, the change in his wage-earning capacity may justify a modification of his disability award. Conversely, if the disabled employee has enhanced his wage-earning capacity

through the acquisition of new skills—the situation presented in this case—the change may also justify a modification. As the Fourth Circuit explained, all changes in an employee's "wage-earning capabilities should be relevant when considering a modification of an award." *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1229 (1985); accord *Avondale Shipyards, Inc.* v. *Guidry*, 967 F.2d 1039, 1042 n.6 (5th Cir. 1992); 3 A. Larson, *The Law of Workmen's Compensation* § 81.31(e) (1994). See also *Hole* v. *Miami Shipyards Corp.*, 640 F.2d 769, 772-773 (5th Cir. 1981); *Vasquez* v. *Continental Maritime*, 23 Ben. Rev. Bd. Serv. (MB) 428 (1990); cf. *Edwards* v. *Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993) (claimant disabled despite temporary work), cert. denied, 114 S. Ct. 1539 (1994).[9]

The Fourth Circuit's result ensures that employees with similarly impaired wage-earning capacities are treated alike: Compensation is awarded for a non-schedule physical impairment—at an initial hearing

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[9] In some circumstances, a request for modification may be time-barred, notwithstanding a change in wage-earning capacity. For example, a claimant whose compensation is terminated because of an increase in wage-earning capacity may be prevented from reinstating the payment of compensation if the claimant suffers a subsequent loss in wage-earning capacity more than one year after the termination. See 33 U.S.C. 922 (allowing modification within one year of the last payment of compensation "or at any time prior to one year after the rejection of a claim"). That one-year limitation also applies, however, to the initial adjudication of claims, *Fleetwood*, 776 F.2d at 1232, and may be extended by "de minimis" awards in certain cases. See *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 62 (2d Cir. 1989); *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 800 (D.C. Cir. 1984); *Hole*, 640 F.2d at 772.

or on modification—only insofar as that impairment causes a continuing loss of wage-earning capacity. "Without such a modification procedure, workers who had secured new skills and employment would be receiving disability compensation when they were not disabled and an [i]nequitable distribution of limited financial resources would result." *Fleetwood*, 776 F.2d at 1229. See also *id.* at 1232; *Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act (Part 2): Hearings Before the Subcomm. on Compensation, Health and Safety of the House Comm. on Educ. and Labor*, 95th Cong., 2d Sess. 494 (1978) (statement of Donald Elisburg, Assistant Secretary for Employment Standards, U.S. Dep't of Labor, that if a claimant arbitrarily refuses rehabilitation services after a final award, the employer could seek modification on the ground of a change in condition).

By contrast, the Ninth Circuit's conclusion that "only a change in a claimant's *physical* condition can justify an award modification" (Pet. App. 3a) ignores the established framework for determining non-schedule benefit payments under the LHWCA, which calculates awards based on the claimant's actual wage-earning capabilities. Under the Ninth Circuit's rule, an employer would be obligated to pay for benefits even when they are unnecessary to compensate injured workers for any continuing loss of wage-earning capacity.

4. Section 8(j) of the LHWCA, 33 U.S.C. 908(j), also indicates that a non-physical change in wage-earning capacity is a "change in conditions" that permits modification. That Section allows employers to require disabled employees "to report to the employer not less than semiannually any earnings from

employment or self-employment," and it provides for forfeiture of compensation by employees who fail to report. That provision, which was part of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 8(h), 98 Stat. 1646-1647, was enacted "in response to the problem of a disabled employee receiving workers' compensation benefits while he has actually returned to gainful employment." 129 Cong. Rec. 571 (1983) (statement of Sen. Nickles); see also H.R. Rep. No. 570, 98th Cong., 1st Sess. 17-18 (1983) (reports "intended to be a device by which employers may maintain some control over claims in payment status"). It is unlikely that Congress would have imposed that reporting requirement on all employees who earn income if no possibility of modification existed in the absence of a change in an employee's physical condition. See 130 Cong. Rec. 8327 (1984) (statement of Rep. Erlenborn) ("It is anticipated that employers will utilize the procedures for modification of awards set forth in section 22 for any subsequent adjustment to benefits.").[10]

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[10] Similarly, the Director's regulations provide that "[a]n employer or insurance carrier may conduct any reasonable investigation regarding cases placed into the special fund by the employer or insurance carrier. Such investigation may include, but shall not be limited to, a semi-annual request for earnings information[,] * * * periodic medical examinations, vocational rehabilitation evaluations, and requests for any additional information needed to effectively monitor such a case." 20 C.F.R. 702.148(c). The regulatory provision governing modification of awards establishes procedures to be followed "[i]f the investigation, described in [20 C.F.R.] 702.148(c), discloses a change in conditions and the employer or insurance carrier intends to pursue modification of the

5. The interpretation of Section 22 that we urge also advances the LHWCA's goal of rehabilitating disabled workers, see 33 U.S.C. 908(g) and 939(c), by creating a positive incentive for employers to participate in rehabilitation programs that provide disabled employees with new vocational skills. The LHWCA's rehabilitation programs are an important part of the overall statutory scheme. Under the interpretation of the Act adopted by the Director and applied by the Benefits Review Board, employers have a strong incentive to promote vocational training for disabled workers and thereby reduce their disability benefits expenditures.[11]

The court of appeals' decision in this case, by contrast, would reduce the employers' financial motivation to participate in rehabilitation efforts. Under the court of appeals' rule, an employee who does not receive rehabilitation until after the award issues

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award of compensation." 20 C.F.R. 702.373(d). The scope of the permissible investigation, and the express recognition that the investigation may reveal a "change in conditions" warranting modification of an award, plainly reflect the premise that the grounds for modification extend beyond changes in the employee's physical condition. The Director's interpretation is entitled to judicial deference. See pp. 25-30, *infra*.

[11] In fiscal year 1993, LHWCA programs successfully rehabilitated 364 employees and provided assistance to 1,178 continuing participants. Employment Standards Admin., U.S. Dep't of Labor, *OWCP Annual Report to Congress FY 1993*, at 13, 24 (1994). A previous annual report noted that about 45% of rehabilitated employees were placed with their previous employers. Employment Standards Admin., U.S. Dep't of Labor, *Longshore and Harbor Workers' Compensation Act: Annual Report on Administration of the Act During Fiscal Year 1992*, at 8-9 (1993).

would be entitled to retain the full award without regard to the effect of future rehabilitation on his wage-earning capacity. Thus, the court of appeals' rule would give employers a diminished incentive to assist in rehabilitating injured workers, because rehabilitation, unless completed prior to the award of compensation, would not reduce the employers' liability.

The court of appeals' ruling could also impair the smooth operation of the statutory scheme by creating incentives for inappropriate delays. On the one hand, an employer would have an incentive to delay the award proceedings until the injured employee's rehabilitation is complete and could be taken into account in determining the award. On the other hand, the injured employee would have an incentive to delay rehabilitation until after receipt of a compensation award, when rehabilitation can no longer be considered in adjusting the award. Those perverse incentives—whether they result in postponement of the compensation award or postponement of rehabilitation—are inimical to the statutory objectives.

6. The court of appeals' rule could also be costly for the Special Fund, which the Director administers. See *OWCP Annual Report to Congress FY 1993*, at 43 (Fund paid more than $90.86 million in 4,672 "second injury" or Section 8(f) cases and approximately $4.8 million in rehabilitation services in fiscal year 1993). Neither the Fund, nor an employer, should be required to pay for compensation based on a disability that has diminished or ceased to exist, as reflected in a permanent increase in wage-earning capacity, even if the claimant's physical condition has not improved.

B. The Director's Construction Is Consistent With Earlier Interpretations Of Section 22 And Is Entitled To Deference

1. In rejecting the Director's construction of Section 22, the Ninth Circuit stated that the phrase "change in conditions" has been uniformly construed "to refer exclusively to a *change in* [*the*] *physical condition* of the employee receiving compensation." Pet. App. 5a (emphasis added by the Ninth Circuit, quoting *Fleetwood*, 776 F.2d at 1235 (Warriner, J., dissenting)). That statement is inaccurate. As the Fourth Circuit recognized, no reported court case (excluding the subsequent decision in this case) "holds that modification of a compensation award cannot be granted when an employee experiences a permanent increase in wage-earning capacity." *Fleetwood*, 776 F.2d at 1229.

None of the cases cited by the Ninth Circuit as establishing that principle so hold, although some include dicta to that effect. For example, the Ninth Circuit relied on its prior ruling in *McCormick S.S. Co.* v. *United States Employees' Compensation Comm'n*, 64 F.2d 84 (1933), which was the first officially reported decision to construe Section 22. In that case, an employee sought to obtain increased compensation through modification because "depressed economic conditions" had resulted in decreased stevedoring work. *Id.* at 85. The Ninth Circuit stated that "we do not think [Section 22] applies to a change in earnings due to economic conditions." *Ibid.* That statement falls far short of a holding that a "change in conditions" excludes all increases in a claimant's wage-earning capacity unless they are accompanied by a change in physical condition.

As the Fourth Circuit recognized, the *McCormick* decision actually supports the Director's position. *McCormick* recognized that "[c]ompensation is awarded only for loss of earning power," 64 F.2d at 85, and it denied modification because the claimant's decrease in wages resulted from lack of work, not from a decrease in his wage-earning capacity, *id.* at 86. See *Fleetwood*, 776 F.2d at 1231. That holding is consistent with the Director's view that an inability to earn wages because of general economic conditions is not an inability "because of injury." See 33 U.S.C. 902(10) (defining "[d]isability"). At bottom, *McCormick* simply held that general economic conditions are not among the "conditions" that are taken into account in determining eligibility for an award.[12]

The Ninth Circuit was also mistaken in relying on its previous decision in *Pillsbury* v. *Alaska Packers Ass'n*, 85 F.2d 758 (1936), rev'd on other grounds, 301 U.S. 174 (1937). The court of appeals observed in that case that whether a claimant was an employee at the time of injury was "obviously" not susceptible to a "change in conditions." 85 F.2d at 759-760. The Director has no quarrel with that conclusion. See also *Fleetwood*, 776 F.2d at 1232 n.6. The

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[12] State courts have long recognized a distinction between a compensable inability to obtain work that results from limited job opportunities available to persons who are physically disabled and a noncompensable inability that results from general economic conditions. See, *e.g.*, *Jordan* v. *Decorative Co.*, 130 N.E. 634, 635 (N.Y. 1921) (Cardozo, J.); *Ray's Case*, 119 A. 191, 192 (Me. 1922); Annotation, *Workmen's Compensation: Statutory Phrase "Incapacity for Work" or the Like, As Including Inability To Obtain Work Following an Injury*, 33 A.L.R. 115 (1924).

Pillsbury decision went on to state, however, that " 'change in conditions' refers to a change in the physical condition of the employee." *Id.* at 760. That observation was mere dictum that did not purport to decide whether an increase in wage-earning capacity could be a change in conditions.[13]

The Ninth Circuit's reliance on *Burley Welding Works, Inc.* v. *Lawson*, 141 F.2d 964 (5th Cir. 1944), was also misplaced. That decision held that a wage increase is not a change in conditions if it does not fairly and reasonably reflect the employee's wage-earning capacity. *Id.* at 966. *Burley*'s holding is correct and is consistent with the Director's view. See *ibid.* (quoting deputy commissioner's decision); *Fleetwood*, 776 F.2d at 1231. *Burley*'s summary of prior law, however, was not accurate. It stated that "the term 'change in conditions' * * * means a change in the employee's physical condition, *and not other conditions*." 141 F.2d at 966 (emphasis added). The only cases that *Burley* cited for that proposition were *McCormick* and *Pillsbury*, which—as we have explained—contain no such holding. See *Fleetwood*, 776 F.2d at 1231-1232. The Ninth Circuit's reliance on *General Dynamics Corp.* v. *Director, OWCP*, 673 F.2d 23 (1st Cir. 1982), suffers from the same flaw. *General Dynamics* repeated the *Burley* dicta, 673 F.2d at 25 & n.6, but did not consider whether a

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[13] Moreover, *Pillsbury* has no precedential value, because this Court reversed the Ninth Circuit's decision on the ground that "the circuit court of appeals was without jurisdiction to entertain the attempted appeal." *Alaska Packers Ass'n* v. *Pillsbury*, 301 U.S. 174, 177 (1937).

"change in conditions" could include a change in wage-earning capacity.[14]

Other cases, not cited in the Ninth Circuit's opinion, contain similar statements.[15] Those cases, like the cases the Ninth Circuit cited, simply reflect a repetition of dicta rather than careful analysis. Their actual holdings are by and large consistent with the position the Director advocates here. For example, in *Atlantic Coast Shipping Co.* v. *Golubiewski*, 9 F. Supp. 315 (D. Md. 1934), a district court held that imprisonment is not a "change in conditions" under Section 22, but stated in dictum that the phrase "would seem obviously to refer to a change in the physical condition of the employ[ee] caused by the accident." *Id.* at 317. The court reasonably concluded that an inability to work caused by imprisonment is not a condition that bears on the statutory definition of "disability" under the LHWCA. *Id.* at 317-318; see also *Allen* v. *Metropolitan Stevedore*, 8 Ben. Rev.

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[14] It is questionable whether the Fifth Circuit itself would construe *Burley* to require a change in physical condition. That court has recently expressed approval of *Fleetwood*. See *Avondale Shipyards*, 967 F.2d at 1042 n.6; cf. *Hole*, 640 F.2d at 772-773.

[15] See, *e.g.*, *Director, OWCP* v. *Drummond Coal Co.*, 831 F.2d 240, 244 n.9 (11th Cir. 1987) (Black Lung Benefits Act); *Director, OWCP* v. *Edward Minte Co.*, 803 F.2d 731, 735 (D.C. Cir. 1986); *Verderane* v. *Jacksonville Shipyards, Inc.*, 772 F.2d 775, 780 (11th Cir. 1985); *Whitney* v. *Agsco Dakota*, 453 N.W.2d 847, 851-852 (S.D. 1990) (construing pre-*Fleetwood* LHWCA decisions as "holding" that "change in conditions" means a change in physical condition); *Lucero* v. *Climax Molybdenum Co.*, 732 P.2d 642, 647 (Colo. 1987) (same).

Bd. Serv. (MB) 366, 368 (1978).[16] The court's dictum regarding the employee's physical condition, however, was entirely unnecessary to its decision.[17]

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[16] As the district court in *Golubiewski* pointed out, the LHWCA contains no statutory exclusion from eligibility for benefits on the part of a person who is imprisoned. Compare 42 U.S.C. 402(x) (limiting the payment of Social Security disability insurance benefits to persons imprisoned on the basis of a felony conviction).

[17] Other cases contain similar dictum. See *Bay Ridge Operating Co.* v. *Lowe*, 14 F. Supp. 280, 281 (S.D.N.Y. 1936) (commitment to a mental institution); *Bethlehem Shipbuilding Corp.* v. *Cardillo*, 23 F. Supp. 400, 403 (D. Mass. 1938) (imprisonment), aff'd, 102 F.2d 299 (1st Cir.), cert. denied, 307 U.S. 645 (1939). The district courts in *Bay Ridge*, 14 F. Supp. at 281, and *Golubiewski*, 9 F. Supp. at 317, relied in part on state workers' compensation cases in concluding that "change in conditions" refers to a change in an injured employee's physical condition. See also *Bethlehem Shipbuilding*, 23 F. Supp. at 403 (relying on *McCormick*, *Bay Ridge*, and *Golubiewski*). The state cases they cite, however, construed statutes materially different from Section 22 of the LHWCA and are therefore not persuasive authority. See *Independence Indem. Co.* v. *White*, 27 S.W.2d 529, 531 (Tex. Comm'n App. 1930) (state laws allowing review and modification of awards are designed to allow an increase, decrease, or termination of awards because of a change in physical condition); *Skelly Oil Co.* v. *Thomas*, 295 P. 213, 214 (Okla. 1931) (construing the term "change of condition"); *South* v. *Indemnity Ins. Co. of N. Am.*, 146 S.E. 45, 46 (Ga. Ct. App. 1928) (same); *Indianapolis Pump & Tire Co.* v. *Surface*, 155 N.E. 835 (Ind. App. 1927) (same); *Franklin County Mining Co.* v. *Industrial Comm'n*, 153 N.E. 608, 610 (Ill. 1926) (state law allowing modification if "disability of the employee has subsequently recurred, increased, diminished or ended"). Cf. *Swift & Co.* v. *Neal*, 18 N.E.2d 491, 493 (Ind. App. 1939) (a 1934 state statute allowing modification "on account of a change in conditions" does not "necessarily mean that there

2. Even if the Ninth Circuit were correct that courts had "uniformly" construed Section 22 to require a change in an employee's physical condition, the Director has permissibly reached a different interpretation. The Director acts on behalf of the Secretary of Labor, who is charged with administering the LHWCA, see 33 U.S.C. 939(a); 20 C.F.R. 701.202(a), and the Director's construction of the phrase "change in conditions" is therefore entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). See, *e.g.*, *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 793-795 (2d Cir. 1992); *Force* v. *Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co.* v. *Howard*, 904 F.2d 206, 208-209 (4th Cir. 1990); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983).[18]

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must be a change in the physical condition of the injured employee").

[18] Not all courts of appeals have deferred to the Director's construction of the LHWCA. See, *e.g.*, *Sea-Land Serv., Inc.* v. *Rock*, 953 F.2d 56, 59 (3d Cir. 1992); *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 287-288 (6th Cir. 1988); cf. *Director, OWCP* v. *General Dynamics Corp.*, 980 F.2d 74, 78 (1st Cir. 1992) (reserving question). Courts refusing to defer have relied on the erroneous premise that "neither the Director nor the [Benefits Review] Board is the officer or agency charged with the administration of the [LHWCA]." *Director, OWCP* v. *O'Keefe*, 545 F.2d 337, 343 (3d Cir. 1976). They overlook that the Director acts pursuant to a delegation of authority from the Secretary, 20 C.F.R. 701.202(a), who has express authority to "administer" the

As we have explained, the Director's interpretation is the most natural construction of the language of Section 22 and is consistent with the structure and purposes of the Act. The Director's interpretation should therefore prevail. See *Chevron*, 467 U.S. at 842-843. There is nothing in other interpretive sources, such as the legislative history, to support a contrary construction. Instead, the legislative history of the LHWCA and its amendments during the 1930s confirms that Congress drafted Section 22 to give agency adjudicators broad authority to reconsider and modify awards. See *Intercounty Constr.*, 422 U.S. at 8-12 (discussing legislative history); *Banks*, 390 U.S. at 463-465 (same).[19]

LHWCA and "make such rules and regulations * * * as may be necessary in the administration" of the Act. 33 U.S.C. 939(a). Compare *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696-697 (1991); *Martin* v. *OSHRC*, 499 U.S. 144 (1991); *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987). As an adjudicatory tribunal without administrative authority, the Benefits Review Board receives no special deference. See *Estate of Cowart*, 112 S. Ct. at 2595; *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).

[19] Congress amended Section 22 in 1934 and 1938. See *Intercounty Constr.*, 422 U.S. at 8-12. During that same general time period, the Ninth Circuit decided *McCormick*, *supra*, and *Pillsbury*, *supra*, which contained dicta suggesting that a "change in conditions" was limited to the employee's physical condition. See pp. 20-22, *supra*. There is no reason to believe that Congress intended to ratify those dicta. The amendments Congress enacted did not address the issue, and there is scant evidence that Congress was aware of the statements in those decisions. The United States Employees' Compensation Commission (USECC), which administered the LHWCA until 1946, mentioned those and numerous other cases in its annual reports to Congress. *Twenty-First Annual*

The legislative history of Congress's 1984 amendments to the LHWCA similarly provides no basis for rejecting the Director's construction. To the contrary, the legislative history indicates that Congress expected Section 22 to be used to adjust the compensation of disabled employees who had returned to gainful employment. See 130 Cong. Rec. 8327 (1984) (statement of Rep. Erlenborn). In that regard, Congress amended Section 22 to give employers (such as petitioner in this case) authority to seek modification of awards that are paid primarily by the Special Fund that the Director administers. See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 16, 98 Stat. 1650; H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 32 (1984).

Furthermore, although the legislative history accompanying the 1984 amendments shows that Congress intended to overrule some Board decisions, see H.R. Conf. Rep. No. 1027, *supra*, at 30; 130 Cong. Rec. 25,902-25,903 (1984) (statement of Rep. Miller); *id.* at 26,300 (statement of Sen. Hatch), it contains no expression of dissatisfaction with the Board's decision in *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 282 (1984), aff'd, 776 F.2d 1225 (4th Cir. 1985), which approved an award modification based on changes in non-physical conditions. In light of that history, there is no plausible basis to believe that Congress ratified pre-*Fleetwood* dicta suggesting that

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Report of the USECC 56 (1937) (describing *Pillsbury*); *Seventeenth Annual Report of the USECC* 15 (1933) (describing *McCormick*). But the USECC's brief summaries provide no basis to think that Congress approved of the dicta in those decisions.

a "change in conditions" is limited to a change in the employee's physical condition. See generally *Brown* v. *Gardner*, 115 S. Ct. 552, 556-557 (1994).[20]

3. The Director's construction is also sound insofar as it reflects a reasonable accommodation of the policies "committed to the agency's care." *Chevron*, 467 U.S. at 845. The Director's construction will not overburden the agency and courts with modification requests because, as discussed above, a change in wage-earning capacity necessary to support modification must be a change in an employee's capacity to earn wages because of injury. See 33 U.S.C. 902(10) (" '[d]isability' means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury" (emphasis added)). Thus, changes in general economic conditions, as in *McCormick*, are not by themselves changes in the conditions causing (or eliminating) disability and therefore should not be a basis for modification.[21]

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[20] In the same year in which it enacted the LHWCA amendments discussed in the text, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, which expressly provides for termination of disability benefits in circumstances other than those in which the individual's medical condition has improved. See § 2(a) and (c), 98 Stat. 1794-1797, codified at 42 U.S.C. 423(f)(2)-(4) and 1382c(a)(4)(B)-(D). It therefore is unlikely that Congress would have intended to foreclose that result under the LHWCA when it amended that Act in 1984.

[21] The fact that state laws authorize modification for nonphysical conditions, see note 7, *supra*, further demonstrates that courts and agencies can successfully administer broad modification provisions. Cf. *Peabody Coal Co.* v. *Gossett*, 819 S.W.2d 33, 35-36 (Ky. 1991) (discussing amended state statute).

Similarly, "a mere change in a claimant's wages," Pet. App. 3a, is insufficient to establish a "change in conditions" under Section 22. Section 8(h) of the LHWCA clearly states that the actual, post-injury wages of an employee who has sustained a partially disabling, non-schedule disability will establish the employee's wage-earning capacity only if the wages "fairly and reasonably represent" his wage-earning capacity. 33 U.S.C. 908(h). If they do not, an agency adjudicator

> may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h). Accordingly, in determining wage-earning capacity, the adjudicator considers such factors as "the beneficences of a sympathetic employer, the claimant's earning power on the open market, * * * [and] circumstances [that] indicate a probable work injury related wage loss in the future." *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984). An increase in wages resulting from inflation is insufficient to establish an increase in wage-earning capacity. See, *e.g.*, *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 61 (2d Cir. 1989).

As the Fourth Circuit recognized in *Fleetwood*, 776 F.2d at 1232, and the ALJ recognized in this case, relevant factors affecting the claimant's future earnings must be considered at both the initial hearing

and the modification hearing. The ALJ in this case observed that the worker's increased wages were not attributable solely to the effects of inflation and salary increases; that the worker was at no greater risk of losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. Pet. App. 16a. The Board additionally noted that the worker had completed vocational training (*id.* at 8a) and that he "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [his] increase in wage-earning capacity after the original award of benefits." *Id.* at 10a.

Thus, nothing in the Director's position, or in the decisions of the ALJ or the Benefits Review Board, suggests that modification under Section 22 follows automatically from a finding that the claimant's actual wages have increased; rather, a change in wage-earning *capacity* must be demonstrated to support modification. The court of appeals erred in concluding otherwise and in rejecting the Director's reasonable interpretation of the LHWCA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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